

Considerations for Successfully Litigating a Traumatic Brain Injury Case

by Michael W. Young

As a complex lattice of neurons, glial cells, and synapses, the human brain is where ideas are formed, emotions are felt, and stimulation initiated. One's ability to communicate, remember, and understand is directly dependent on a well-functioning brain. Indeed, every breath one takes is done at the direction of his or her brain. And while we have learned much about the brain and its function, we remain incredibly ignorant of much of the brain's ability. Accordingly, while cases involving a brain injury intuitively seem straightforward, they are often quite difficult and complicated. Even the most careful practitioner can fail to fully understand and effectively prosecute his or her client's case. Failing to completely understand the nature of a client's injury can be catastrophic. However, among the difficult terrain, advantage awaits. By carefully assessing your case at the outset, one can make strategic decisions regarding which experts to employ, when to press for a settlement, and how to prepare for trial.

WHAT IS A TRAUMATIC BRAIN INJURY

Traumatic brain injury (TBI) accounts for nearly thirty percent of all injury deaths in the United States. See Paul, M., Xu, L., Wald, M.M. & Coronado, V.G., *Traumatic Brain Injury in the United States: Emergency Department Visits, Hospitalizations, and Deaths*, ATLANTA (GA): CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL (2010). Additionally, approximately 3.6 to 5.3 million people in the United States suffer from residual consequences from a TBI. See Coronado, VG, et al., *Traumatic Brain Injury Epidemiology and Public Health Issues*, IN BRAIN INJURY FOR LAWYERS, 84-100 (Zasler ND, DI Katz, & RD Zafonte eds., 2d ed. 2013). Public awareness of these injuries has grown in recent years due largely to the publicity received by the National Football League and other leagues for the effects concussions and other head injuries have on players. Yet while the issue of head trauma has come to the forefront of the public theater, a

basic understanding of what a TBI is and how it can affect an individual remains limited.

In the most basic sense, a TBI is an injury to the brain due to external trauma to the head. The injury itself may be focal, diffuse, or both. See generally, Hubbard, J & Hodge, S., *Traumatic Brain Injury*, in HEAD TRAUMA AND BRAIN INJURY FOR LAWYERS, 127-153(2016). A TBI is traditionally classified as either mild, moderate, or severe depending on a number of factors. Often the Glasgow Coma Scale is used to measure the severity of a TBI by looking at a number of neurological parameters such as eye movement, motor response, and verbal interaction. The more severe the TBI, the lower the individual will score on the Glasgow Coma Scale. The injury is often microscopic and can be difficult to observe in a CT scan. Nevertheless, a TBI's effect on a brain's neurons and glial cells can be very serious and life-altering.

The prognosis for an individual with a TBI is very broad. Some TBIs, like a mild concussion, can resolve within days, where other TBIs result in death or severe disability. As one might guess, recovery is largely dependent on the severity of the underlying injury. A severe TBI will almost always result in some form of long-lasting disability, where sixty-six percent of moderate TBI cases result in a long-lasting disability, and only ten percent of mild TBI cases experience long-lasting disability. Leon-Carrion, J, et al., *Epidemiology of Traumatic Brain*

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Injury and Subarachnoid Hemorrhage, PITUITARY 8:3-4 (2005). Ultimately, there is no specific treatment to resolve a TBI and individuals suffering from a TBI are forced to simply manage symptoms.

ASSESSMENT OF YOUR CLIENT'S INJURY

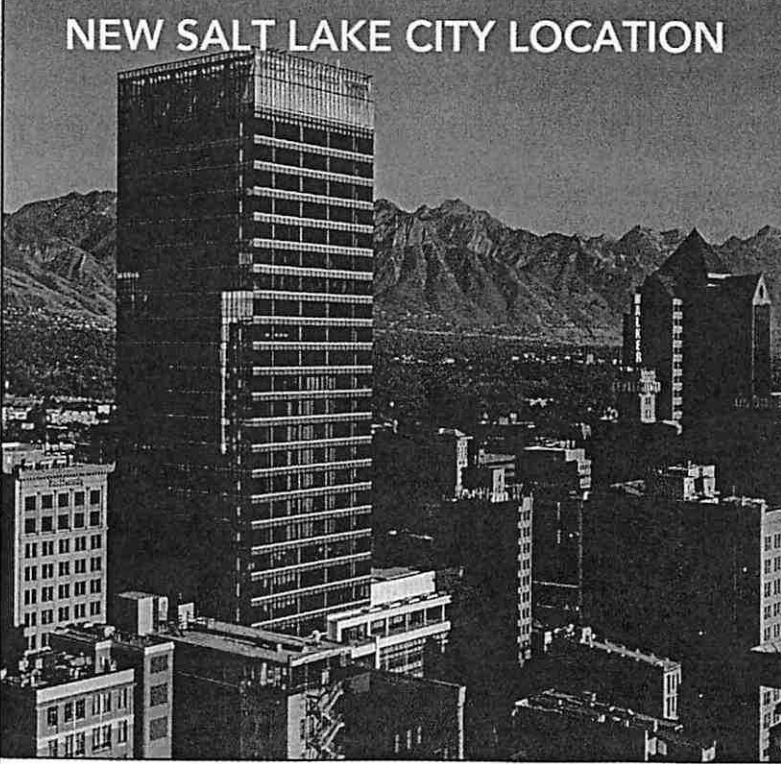
As with most personal injury cases, the initial assessment of the client and his or her injuries is critical. However, merely knowing that your client likely suffers from some sort of brain injury is not enough. It is important to understand very early in a case the precise kind of brain injury from which your client suffers and the mechanism for that particular kind of injury. It is equally important to have a clear picture of your client's prognosis and future care needs. By having a firm understanding of the client's particular injury and the prognosis for that injury, meaningful decisions about how to move a client's case forward can be made.

Brain Imaging, Diagnostic Testing, and a Cadre of Experts

Establishing firm, scientific proof that a person suffers from a mild or even moderate TBI can be an extremely difficult task. For example, only recently has the scientific community come

to understand that mechanism of injury for certain brain trauma manifests itself as a metabolic process at a cellular level with destructive consequences over time. See Luce, R., *Proving a "Mild" Traumatic Brain Injury: A Complex But No Longer Impossible Task*, 38-SPG VT. B.J. 12, 15 (2012). That is, the actual injury to the brain may occur over the course of weeks, months, or even years. Accordingly, a delay in symptoms rather than speaking to the credibility of an injury, is actually reflective of the injury itself. *Id.* Compounding this issue is the fact that the symptoms associated with a mild TBI overlap with other medical conditions like post-traumatic stress disorder or depression. Centers for Disease Control, *Facts for Physicians 4*, available at http://www.cdc.gov/concussions/headsup/pdf/Facts_for_Physicians_booklet-a.pdf.

There are a number of imaging and testing options available to determine if someone has suffered from a brain injury. The options available and the reasons for using certain tests as opposed to others varies. For example, even though a magnetic resonance image (MRI) will often not detect a mild TBI, an MRI used in conjunction with a magnetoencephalography (MEG) scan can create a magnetic source image (MSI), or map, of a person's brain. Such a map can show normal and abnormal



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areas of brain function as well as rule out alternative explanations for diminished brain function like tumors or congenital defects. Additionally, because an MRI will often not detect a mild, and in some cases, a moderate TBI, when such is observable under an MRI, that evidence can be quite powerful. Alternatively, a Tesla MRI, which uses a more powerful magnet than that used in traditional MRIs, can often detect diffuse axonal injuries in living brain tissue.

Once imaging has been done, a practitioner should start to get some sense of the injury that he or she is dealing with. From there, it is critical to retain an expert to help interpret the results and to paint a picture of how the particular injury will affect the client. A neuropsychologist – a psychologist who specializes in neurological treatment – can identify brain dysfunction, establish a prognosis for the injury, outline cognitive deficits, and opine on issues of employability and need for supervision and aid through diagnostic testing and interviews. Even with the help of a neuropsychologist, however, it may be necessary to retain a neurologist – a medical doctor who specializes in treating the nervous system – for trial who can support and substantiate the connection between the imaging and the neuropsychologists' testing and opinions.

For those keeping track, that is up to three separate experts just to substantiate that a brain injury has occurred. One will still need to retain additional experts possibly including a biomechanical engineer (proximate causation), neuropsychiatrist (general causation and damages), psychiatrist (general damages and lost future economic damages), life care planner (future medical damages), vocational rehabilitation expert (future economic damages), and an economist (economic damages). Of course, when and if each of the above-listed experts are needed is a question of both strategy and necessity.

USING EXPERTS EFFECTIVELY IN TRAUMATIC BRAIN INJURY CASES

Given the unique nature of cases involving a TBI, one can no longer offload expert costs and investigation to a later stage of litigation. Failing to understand the kind of brain injury at issue puts a client's needs at immediate risk. In determining when to

enlist the help of an expert, it is useful to remember that the expert may perform many different functions aside from simply providing an opinion at trial. Often there is room for an expert to be enlisted initially as a consulting, rather than a testifying, expert. Additionally, Rule 26 of the Federal Rules of Civil Procedure protects draft reports from disclosure, giving experts greater freedom to explore an underlying case and share his or her opinions with the client's attorney. Perhaps most useful is the disclosure of expert reports under Rule 408 of the Federal Rules of Evidence.

Under Rule 408, "conduct or [] statement[s] made during compromise negotiations about the claim" are not admissible to "prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or contradiction." Fed. R. Evid. 408. Accordingly, Rule 408 can be used as a mechanism to freely discuss the merits of a client's case with a loss-adjuster, or opposing counsel. *See, e.g., Lyondell Chem.*

Co. v. Occidental Chem. Corp., 608 F.3d 284, 295–97 (5th Cir. 2010); *R.R. Donnelley & Sons Co. v. N. Texas Steel Co.*, 752 N.E.2d 112, 133 (Ind. Ct. App. 2001); *Hulter v. C.I.R.*, 83 T.C. 663, 666 (1984). Expert testimony in the form of a preliminary or draft report early in a case can set a powerful tone for litigation or

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settlement discussions.

As discussed above, engagement of certain experts is necessary in cases involving a TBI. Converting an expert's preliminary assessment into a draft/preliminary report to be used in negotiating with an adjuster or lawyer often requires little, if any, additional effort or cost. Alternatively, an expert's early assessment will also clue in a practitioner to the strengths and weakness of his or her case and provide guidance as to what other experts might be retained, what additional investigation needs to be performed, and whether early settlement discussions or mediation would be advantageous. In this respect, the complicated nature of brain injury cases provides the careful practitioner with a definitive advantage in forging a beneficial narrative in pre-suit negotiation, discovery, and trial. Recognizing this advantage, one should invest early in expert involvement in brain injury cases. Such an investment will undoubtedly pay dividends later.